Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ALEXANDER BLAIR SIBLEY, a minor,
by and through
MONTGOMERY BLAIR SIBLEY, his Father,

Petitioner,

vs.

MAXINE COHEN LANDO, in her capacity
as a Judge of the Circuit Court of the 11th Judicial Circuit
in and for Miami-Dade County, Florida,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

First, whether the *Younger* doctrine was impermissibly invoked by the District Court to abstain from exercising its jurisdiction over Petitioner's §1983 action seeking a declaration that Florida Statute §61.30(12) invidiously discriminated against Petitioner based solely upon his status as a child born of a subsequent marriage and thus the Eleventh Circuit's affirming of the District Court's abstention under *Younger* resulted in decision that (i) is in conflict with the decision of another United States court of appeals, (ii) has decided an important question of federal law that has not been, but should be, settled by this Court, and (iii) that conflicts with relevant decisions of this Court?

Second, whether the Eleventh Circuit's affirmance of the District Court's dismissal and abstention after denying leave to Petitioner to amend even once his §1983 complaint for declaratory relief (i) so far departed from the accepted and usual course of judicial proceedings and/or sanctioned such a departure by a lower court as to call for an exercise of this Court's supervisory power and (ii) decided an important federal question in a way that conflicts with relevant decisions of this Court?

Third, whether the "Do Not Publish" Rule of the Eleventh Circuit conflicts with the holding of the United States Court of Appeals for the Eighth and Fifth Circuits and that such a rule is inconsistent with the doctrine of *Stare Decisis* and thus departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power and raises an important question of federal law that has not been, but should be, settled by this Court?

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Alexander Blair Sibley, a minor, by and through Montgomery Blair Sibley, his Father and counsel, prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit entered February 20, 2004.

OPINIONS BELOW

The May 19, 2003, order of the United States District Court for the Southern District of Florida dismissing the complaint is found at *Appendix-20.*

The February 20, 2004, opinion of the United States Court of Appeals for the Eleventh Circuit affirming the dismissal of the complaint is found at *Appendix-32.*

The March 31, 2004, order denying Petitioner's motion to publish of the United State Court of Appeals for the Eleventh Circuit is found at *Appendix-35.*

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on February 20, 2004. A timely filed motion for rehearing was denied on March 31, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

(Set-out in Appendix)

U.S. Constitution, 14th Amendment, Section 1
U.S. Constitution, 14th Amendment, Section 5
28 U.S.C. §1653
28 U.S.C. §2072(b)
42 U.S.C. §1983
Federal Rules of Civil Procedure, Rule 15(a)
Eleventh Circuit Rule 36-2
Florida Statute §61.30(12)

STATEMENT OF THE CASE

In the summer of 1994, a petition for dissolution of marriage was filed in Florida by Barbara Sibley against Petitioner's Father ("Father"). A final judgment of dissolution was granted on September 20, 1994, between them in the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, Case No.: 94-18177 FC 19. Of that marriage, three children were born: Margaret Sibley, Elizabeth Sibley and Montgomery Sibley, Jr.

Three years later in 1997, Petitioner was born of the marriage of Father and his second wife, Svetlana Sibley.

At a hearing held July 13, 2001, to address modifying Father's financial obligations to his children of the first marriage, Respondent announced her understanding of her constitutional obligation to children born of a second marriage stating:

I find that his argument that he now has a

> fourth child so he can't pay his daughter's tuition to be something that the Court is rejecting. Seven years ago he signed an agreement, he seems to be somebody who understands what agreements are about, and I do still consider, well, God bless all persons coming to this world, the conception of a child to be a volunteer act and a knowing act in somebody of Mr. Sibley's intelligence. So I assume somebody of intelligence such as Mr. Sibley wouldn't have another child unless he could afford to, and unless he did so understanding completely his responsibilities to his other children, who he says he love just as much as this new one. So I have to reject that argument as being illogical in light of the court's knowledge of the parties, their education and their station in life. . . For all of those reasons the Court certainly will compel that Mr. Sibley comply and pay this tuition. (Emphasis added).

Father on August 7, 2001, appealed to the Florida Third District Court of Appeal Respondent's orders of July 13 and 24, 2001, specifically raising on behalf of Petitioner the issue of the equal protection violation of Petitioner's rights as articulated by the dissent in *Pohlmann v. Pohlmann*, 703 So. 2d 1121 (5th DCA 1997). That appeal was assigned Case Number 3D01-2173. Some 232 days later, on March 27, 2002, the Florida Third District Court of Appeals affirmed the Respondent's orders in Case Number 3D01-2173 with an opinion which affirmed *per curiam* without written explanation and which thus ignored completely the substance of Father's equal protection arguments on behalf of Petitioner. Father's motion for reconsideration, rehearing and

clarification in Case Number 3D01-2173 was subsequently denied *per curiam* without opinion on May 29, 2002.

In the interim, on August 4, 2001, Father filed his Supplemental Petition for Modification of Child Support in the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, Case No.: 94-18177 FC 19. That supplemental petition sought relief from the terms of the Marital Settlement Agreement between the Father and Barbara Sibley that (i) Father pay $4000/month in support for his first three children and (ii) Father pay all the educational expenses of his first three children. The basis for the Supplemental Petition was that due to Father's inability to secure employment as an attorney and the birth of Petitioner by a subsequent marriage, there had been a sufficient, material, involuntary and permanent in nature change in his financial circumstances warranting a modification. Significantly, Father again raised the issue of equal protection on behalf of Petitioner stating in that Supplemental Petition "Additionally, [Father] has fathered another child who must be accorded equal protection under the laws and constitution of the State of Florida and the U.S. Constitution to a proportionate share of [Father]'s financial obligations."

In January, 2002, Barbara Sibley filed two motions for contempt against Father relating to enforcement of the Marital Settlement Agreement between them for child support. The first sought payment of $4,000/month in child support from July 2000 until the present pursuant to the terms of the Martial Settlement Agreement between them. The second motion for contempt sought enforcement of the terms of the Marital Settlement Agreement between them which required that Father to pay 100% of his first three children's educational expenses.

On August 5, 2002, Respondent signed orders granting Barbara Sibley's motions for contempt. As to the order on child support, Respondent adopted Barbara Sibley's counsel's findings *verbatim* and – ignoring both Petitioner's existence and financial needs – ordered Father (i) to pay $100,000 for past due child support, (ii) remain current on his child support of $4,000 per month thereafter and then found that Father "at all times from May 2000 had the present financial ability to pay but willfully or intentionally failed and refused to do so and wilfully violated the Order of this Court." Respondent then sentenced Father to Ninety (90) days in the Miami-Dade County Jail beginning January 1, 2003, unless he paid the specified amounts by December 1, 2002. In the child support order, the Respondent adopted Barbara Sibley's counsel's findings verbatim and based her conclusion of Father's "ability to pay" upon "her" *non-sequitur* findings that: Father's 1994 financial affidavit showed a net income of $3,460/month; his 1998 financial affidavit showed a net income of -$1,435 and a net negative net worth of -$57,400; his 1999 financial affidavit showed a net income of $2,918/month and a negative net worth of -$121,900; his present gross income was $37,500 annually from his employment: From these facts, Father was to pay exclusively for the benefit of the three children of his first marriage $48,000/year - 133% of his gross annual income.

As to the order on the children's educational expenses, Respondent again adopted verbatim Barbara Sibley's counsel's findings and (i) sentenced Father to be incarcerated for Ninety (90) days in the Dade County Jail beginning November 1, 2002, (ii) provided that Father may purge the incarceration order by paying $174,866.31 within sixty (60) days of the date of the order and (iii) allowing Father to make a motion to Respondent to have the Children's Trusts pay for the past, present and future educational expenses of the children in

order to discharge Father's obligations.

On November 22, 2003, Respondent incarcerated Father pursuant to the child support order. On December 23, 2003, two judges of the Florida Third District Court of Appeals entered the majority opinion in *Sibley v. Sibley*, Case No. 3D02-3171, 833 So.2d 847 (Fla. 3d DCA 2002) affirming Father's incarceration "for indirect contempt," holding remarkably that (i) "the record shows substantial assets, although admittedly not in the purge amount, in his [Father's] own name", and (ii) Father "may command, simply by asking, the payment of the purge amount through his very wealthy father. . ." That holding was the subject of Father's petitions for certiorari denied by this Court in Cases Numbered 03-370 and 03-682.

On July 15, 2003, Petitioner filed this action below, which sought solely a declaration from the District Court that Petitioner's rights secured by the Fourteenth Amendment Equal Protection and Due Process Clauses were violated by the Respondent in her state judicial capacity by:

a. Respondent's orders on child support;

b. Respondent's application of Florida Statute §61.30(12) and Florida case law interpreting that statute in her child support orders which required her to ignore Petitioner's existence in setting and enforcing Father's child support obligations to the children of his first marriage; and

c. Respondent's position that Florida law permits children born of a second marriage to be treated differently than children born of a first marriage in determining child support obligations of their parents. *Appendix-3-4.*

On May 19, 2003, the District Court both dismissed the complaint for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine and abstained from accepting jurisdiction under the *Younger* doctrine. *Appendix-20.* Remarkably, the District Court also denied to Petitioner leave to amend his complaint based upon the prior litigation history of Petitioner's Father. *Appendix-17.*

On February 20, 2004, the Eleventh Circuit Court of Appeals affirmed the abstention by the District Court under the *Younger* doctrine, and did not address the *Rooker-Feldman* dismissal. Additionally, ignoring the flagrant *ad-hominem* denial of Petitioner's motion to amend the compliant by the District Court, the Eleventh Circuit concluded that such amendment would be "futile" and hence it was not an abuse of discretion to deny Petitioner leave to amend the complaint. *Appendix-33.* Last, that opinion was marked "Do Not Publish" pursuant to Eleventh Circuit Rule 36-2. Petitioner promptly moved to publish the decision raising constitutional arguments. On March 31, 2004, that motion was denied by the Eleventh Circuit. *Appendix*-35.

REASONS FOR GRANTING THE WRIT

There are five compelling reason for granting this writ:

First, the judicially-created *Younger* doctrine cannot be extended to require that Petitioner intervene in the Florida State Court proceedings to secure his Federal Constitutional and Congressionally secured civil rights to equal protection and due process as the Eleventh Circuit required here.

Second, in 1996, Congress amended 42 U.S.C. §1983 thus limiting the scope of the *Younger* doctrine.

Third, the Eleventh Circuit's decision conflicts with decisions of this Court which require that an adequate state remedy be available to Petitioner before *Younger* can be invoked to avoid Federal jurisdiction – an element plainly lacking here.

Fourth, by prohibiting Petitioner from any opportunity to amend his complaint, Petitioner had his rights secured by 28 U.S.C. §1653 and the Federal Rules of Civil Procedure, Rule 15(a) shamefully trespassed upon by both the District Court and the Eleventh Circuit.

Last, the fundamental notion of *stare decisis* prohibits the Eleventh Circuit Court of Appeals from issuing "Do Not Publish" decisions just as that same notion would prohibit this Court from adopting a similar procedure.

I. Petitioner's Fourteenth Amendment Violation Claim

The essence of Petitioner's Equal Protection and Due Process claim pursuant to the Fourteenth Amendment and §1983 is that the State of Florida – through Respondent and Florida Statute §61.30(12) – invidiously discriminates against children of subsequent marriages by denying those children the same level of financial support as Florida requires to be given to children of a prior marriage.

Only one other federal circuit court has addressed the issue of equal protection and state statutes setting child support obligations. In *P.O.P.S. v. Gardner*, 998 F.2d 764 (9th Cir. 1993), the court affirmed a dismissal of a constitutional challenge to a Washington state child support schedule which – similar to Florida's scheme found at §61.30(12) – excluded subsequently born children of other relationships in determining the level of child support to be ordered. *Id.* at 769.

In upholding the constitutionality of the child support schedule against an equal protection challenge, the Ninth Circuit held that the "schedule does not directly and substantially interfere with fundamental rights". *Id.* at 770. However, unlike Florida Statute §61.30(12), the Washington State schedule expressly required the courts to consider and if necessary deviate from the schedule if children from other relationships were present. *Id.* at 769.

Notably, Florida does not permit such a deviation, expressly prohibiting such consideration at §61.30(12)(c): "The issue of subsequent children under paragraph (a) or paragraph (b) may only be raised in a proceeding for an upward modification of an existing award and may not be

applied to justify a decrease in an existing award." (Emphasis added).

This Court must look to a directly analogous determination of equal protection guarantees found at *Gomez v. Perez*, 409 U.S. 535 (1973) in evaluating Petitioner's claim. There, this Court addressed the issue of "whether the laws of Texas may constitutionally grant legitimate children a judicially enforceable right to support from their natural fathers and at the same time deny that right to illegitimate children." *Id.* at 535. This Court first found that "the controlling law is the Texas common-law rule that illegitimate children, unlike legitimate children, have no legal right to support from their fathers." *Id.* at 536-537. In striking down the quoted law of Texas, this Court held:

> Under these decisions, a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers - there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a State to do so is "illogical and unjust." *Id.*, at 175, 92 S.Ct., at 1406.

Id. at 537-538.

Here, Florida has established a statutory right for children of a first marriage to needed support but explicitly has denied children – whose only crime was to be

subsequently born of one different parent – the same right to needed support. For Florida to do this is "illogical and unjust".

Indeed, if Petitioner had been born out-of-wedlock – which he was not – *Gomez* would have precluded the disparate treatment Florida sets at §61.30(12). Subsequently born children do not need less food than the prior born children. However, that is plainly what the public policy of the State of Florida mandates by §61.30(12)(c) generally and in this case specifically.

In *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972) this Court noted "the basic concept of our system [is] that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parent." Here, it is the child born of a second marriage that is being penalized the same way an illegitimate child was being penalized in *Weber*.

In *Pohlmann v. Pohlmann*, 703 So. 2d 1121 (5th DCA 1997) the only Florida case which has addressed and upheld this issue of the constitutionality of §61.30(12), in his well-worded dissent, Judge Harris stated "The issue in this case, quite simply, is whether it is a 'legitimate government interest' for the State, through its legislative process, to prefer certain children over others. Because I believe that it is not, I would hold §61.30(12), Florida Statutes, unconstitutional under the provisions of Article I, § 2, of the Florida Constitution."

Accordingly, Petitioner has a valid claim for which Congress through §1983 has provided a remedy in Federal

District Court.

II. The Eleventh Circuit's Affirmance of the District Court's Abstention under *Younger* Is in Conflict with the Decision of the Seventh Circuit Court of Appeals and Has Decided an Important Question of Federal Law That Has Not Been, but Should Be, Settled by this Court and Additionally Conflicts with Relevant Decisions of this Court

A. *Younger* Does Not Require Petitioner to Intervene in the State Proceedings

Petitioner – a six year old boy – is not a party to any on-going Florida State proceeding, nor could he be under the Florida Rules of Civil Procedure. Indeed, subsequent to the filing of the complaint, Petitioner sought to intervene in the Florida Family Court proceeding between Father and Father's first ex-wife to assert his right to support from Father acquired under the divorce degree between Father and Father's second ex-wife entered in Maryland in June 2003. This attempted intervention by Petitioner the Florida Family Court refused to permit. *Appendix-30.*

Accordingly, by approving the District Court's invocation of the *Younger* doctrine, the Eleventh Circuit has expressly held that Petitioner's must intervene and can only pursue his §1983 claim in Florida State Court. Yet, as the Florida State Court order plainly states, "The Motion to Intervene on behalf of [Petitioner] Alexander Blair Sibley be and the same is hereby DENIED". *Appendix-31.* As such, *Younger* has now been used to completely deny to Petitioner any forum to assert his claim.

The Eleventh Circuit's holding in this regard expressly conflicts with the Seventh Circuit's holding in *Hoover v. Wagner*, 47 F.3d 845, 848 (7th Cir. 1995): "[N]othing in *Younger* or the cases following it suggests that persons claiming a violation of their federal rights have an obligation before turning to federal court to see whether there is some state court proceeding that they might join in order to present their federal claims there."

Wherefore, this Court must accept certiorari as the decision of the Eleventh Circuit in this matter is in direct conflict with the decision of the Seventh Circuit court of appeals. Moreover, this Court should decided the important question of federal law regarding *Younger's* requiring intervention in a state court proceeding that has not been, but should be, settled by this Court as *Younger* is being utilized to deny access to any court for redress of constitutional grievances.

B. This Court Must Settle the Implication of the Federal Courts Improvement Act of 1996 on the Scope of *Younger*

Congress, pursuant to its authority found in the Fourteenth Amendment, Section 5, enacted §311 of the Federal Courts Improvement Act of 1996 and thereby amended 42 U.S.C. §1983 to specifically include authority for a declaratory judgment action against a judge such as Petitioner has brought here. ("... [E]xcept that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. *Appendix-37*). As stated in the Report by the Senate Committee on the Judiciary on §311,

"[m]oreover, litigants may still seek declaratory relief, and may obtain injunctive relief if a declaratory decree is violated or is otherwise unavailable."

As such, given the supremacy of the Rules Enabling Act found at 28 U.S.C §2072(b), the *Younger/Trainor* doctrine in a §1983 action no longer has vitality by reason of this Congressional action.

Patently, the Rules Enabling Act by its terms forbids Court rules – here *Younger* through *Trainor* – to "abridge, enlarge, or modify" any substantive right. As this Court noted in *Sibbach v. Wilson*, 312 U.S. 1 (1941), the federal courts, in adopting rules, were not free to extend or restrict the jurisdiction conferred by a statute. *Id.*, at 10.

Thus to employ *Younger* (1971) and *Trainor* (1977) to restrict access to Federal District Court as expressly provided by the subsequently enacted §311 of the Federal Courts Improvement Act of 1996, clearly "abridges" Petitioner's substantive rights under the 1996 amendment to 42 U.S.C. §1983. As such, the District Court was prohibited from abstaining by Congressional action which voided the *Younger/Trainor* doctrine.

Accordingly, as the Eleventh Circuit by its affirmance of the District Court's abstention under *Younger* has decided the important question of the scope of *Younger* post-§311 of the Federal Courts Improvement Act of 1996, this Court must decided this important question of federal law that has not been, but should be, settled by this Court in order to discharge its obligation pursuant to 28 U.S.C §2072(b) to harmonize its judicially-created *Younger* doctrine with the subsequently enacted and conflicting amendment to §1983.

C. The Eleventh Circuit's Decision Conflicts With Relevant Decisions of this Court

The *Younger* doctrine arises from this Court's holding in *Younger v. Harris*, 401 U.S. 37 (1971) in which the plaintiff sought a federal injunction to bar a state criminal prosecution. Two grounds for *Younger* abstention were laid out by this Court: interference with state actions and notions of "comity".

In *Trainor v. Hernandez*, 431 U.S. 434 (1977), this Court extended the doctrine to include federal declaratory actions under 42 U.S.C. §1983, but, only under limited circumstances. *Trainor* recognized that abstention was inappropriate when, "extraordinary circumstances were present warranting federal interference or unless their state remedies were inadequate to litigate their federal due process claim" *Id.* at 446.

This holding was further refined in the pre-§311 of the Federal Courts Improvement Act of 1996 case of *Middlesex County Ethics Comm. v. Garden State Bar Assoc.*, 457 U.S. 423, 432 (1982), where this Court set out three benchmarks to guide the application of *Younger* abstention: "first, do state bar disciplinary hearings within the constitutionally prescribed jurisdiction of the State Supreme Court constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges." *Id.* at 432.

Most recently, in *Ankenbrandt v. Richards*, 504 U.S. 689, 706 (1992), this Court noted, "In this case, there is no allegation by respondents of any pending state proceedings, and Ankenbrandt contends that such proceedings ended prior

to her filing this lawsuit. Absent any pending proceeding in state tribunals, therefore, application by the lower courts of *Younger* abstention was clearly erroneous."

First, those "extraordinary circumstances" here are the manner in which the State of Florida treats the right of children of subsequent marriages to support from their parents in direct conflict with this Court's holdings as outline in detail *supra* in Point I. In the instant case as alleged in the Complaint, this includes that Father pay "over 100% of his annual income to support the first three children of Father thereby leaving nothing from Father for [Petitioner]'s support." *(Appendix-10, ¶24)*. Moreover, had leave been granted to Father under Federal Rules of Civil Procedure, Rule 15, to amend the complaint, he would have additionally alleged, that Respondent incarcerated Petitioner for 75 days without any regard to the rights of Petitioner to enjoy support from his Father during that time.

Second, there are no "pending proceedings" in Florida State court to which Petitioner is a party – indeed, leave to intervene in those proceedings has been denied to Petitioner. *Appendix-30*.

Third, Petitioner has no "adequate opportunity in the state proceedings to raise constitutional challenges." Indeed, as made clear by the Florida Family Court, Father attempted to raise the issue "that [Petitioner] Alexander Blair Sibley was being denied equal protection of the law by the rulings of this Court with regard to child support due and owing to the three (3) children of Respondent/Former Husband's marriage to Petitioner/Former Wife. Respondent/Former Husband's issue was rejected by this Court's predecessor, which ruling was affirmed on appeal." *Appendix-30*. Thus, the Florida Family Court ruled that "[t]he Motion to Intervene on behalf of [Petitioner] Alexander Blair Sibley be and the same is hereby

DENIED." *Appendix-31.* Clearly, Petitioner has no such "opportunity".

Last, the statutory scheme of Florida Statute §61.30(12) expressly prevents Respondent from considering Petitioner when determining Father's obligation to pay child support to his first three children. Indeed, every Florida court to address the issue has concurred that Florida Statute §61.30(12) is constitutional. *See*: *Robinson v. Robinson*, 657 So.2d 958 (Fla.App. 1st Dist. 1995); *Pohlmann v. Pohlmann*, 703 So. 2d 1121 (Fla.App. 5th Dist. 1997); *State Dept. of Revenue on Behalf of Powell v. Feeney*, 689 So.2d 350 (Fla.App. 2nd Dist. 1997); *Miller-Bent v. Miller-Bent*, 680 So.2d 1119 (Fla.App. 1st Dist. 1996); *Hice v. Pace*, 675 So.2d 952 (Fla.App. 1st Dist. 1996). As such, Petitioner has no opportunity to raise this issue of the constitutionality of Florida Statute §61.30(12) in the Florida State court and thus *Younger* cannot be applied as there is no "adequate forum" to litigate Petitioner's Equal Protection claim.

In sum, as the Eleventh Circuit's decision affirming the District Court's abstention under *Younger* conflicts with this Court's holding in *Younger, Trainor, Middlesex County* and *Ankenbrandt*, this Court is required to exercise its jurisdiction to resolve this conflict as the Eleventh Circuit's decision ignores the absence of those necessary elements this Court requires before *Younger* abstention may be invoked.

III. Petitioner Was Denied An Opportunity to Amend The Complaint

To the extent there is some pleading defect in the complaint, this Court must take note that at the oral argument before the District Court on August 27, 2003, Petitioner made an *ore tenus* motion for leave to amend to address any such supposed deficiencies in the complaint which motion was

denied by the District Court. *Appendix -17.* This denial was particularly onerous as Petitioner had a right to amend once as a matter of right pursuant to the Federal Rules of Civil Procedure, Rule 15(a), which right the District Court denied to him. ("A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . .". Here, no responsive pleading as defined by Federal Rules of Civil Procedure, Rule 7(a) had been served by Respondent at the time of the oral argument on August 27, 2003.)

Additionally, on appeal, Petitioner sought from the Eleventh Circuit Court of Appeals an opportunity to amend his complaint, which that court denied, stating "Plaintiff contends that the court abused its discretion in denying him leave to amend his complaint. We find no abuse of discretion; an amendment would be futile." *Appendix-32.* As detailed above, an amendment would not have been "futile", given the foreclosure of to Petitioner of any remedy in Florida State Court.

Without question, the policy of the federal rules is to permit liberal amendment to facilitate determination of claims on the merits and to prevent litigation from becoming a technical exercise in the fine points of pleading. *See, e. g.*, *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Conley v. Gibson*, 355 U.S. 41, 48 (1957). Thus, unless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial. See: 28 U.S.C. §1653; *Lone Star Motor Import v. Citroen Cars*, 288 F.2d 69, 75 (5th Cir. 1961).

Here, remarkably, that "substantial reason" as articulated by the District Court in denying Petitioner's request was simply irrelevant and, appallingly and grotesquely, *ad hominem*:

[Counsel for Respondent]: [Petitioner] not complied with the Florida Statute that requires notice to the Attorney General and various other things that need to be filed that would allow the Attorney General to intervene as the Attorney General and to defend the constitutionality of this statute.

Judge Huck: That's the first I have heard of this argument. I did not view this complain as a general attack on the -- on section 61.30(12). Appears when you look at the overall allegations of the complaint this is really an attack on Judge Lando's orders.

[Counsel for Respondent]: That's the way I read it too, Your Honor.

[Counsel for Petitioner]: May I respond.

Judge Huck: Yes, sir.

[Counsel for Petitioner]: To the extent the Court is leaning that way I would ask under the liberal pleading rules that I have leave to be more specific in that this is a general attack on this particular statute and its Constitutionality.

Judge Huck: I am not inclined to do that. I cannot ignore your history in this Court and in the State Courts. Frankly, while I do not think it's appropriate to enter an order restricting your ability to file lawsuits I think it's within my discretion to allow you to amend the complaint, and I'm going to deny that.

Appendix-17. Even if Father has a "history" in the federal and state courts, that is certainly no reason to visit the sins of the Father on his Son, Petitioner. Accordingly, if a pleading defect alone is the reason to deny certiorari here, then Petitioner must be afforded an opportunity to amend the complaint to more clearly state his cause of action.

Moreover, as stated above, permitting Petitioner to amend the complaint would have allowed Petitioner to allege (i) his denial of an available remedy in Florida state court thus precluding *Younger* abstention and (ii) allegations which more closely aligned with those in *P.O.P.S. v. Gardner*, *supra*, in which the Plaintiff there successfully brought a constitutional challenge in Federal District Court to a state child support statutory scheme just as Petitioner here was attempting to do. To hold otherwise, simply closes the courthouse door to Petitioner and is a gross "abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman*, *supra* at 182.

Finally, the Eleventh Circuit, by holding that "We find no abuse of discretion; an amendment would be futile", has set a new standard for permitting amendments to pleadings. *Appendix-34.* That standard substitutes the all-knowing judgement of the District Court and Circuit Court against permitting a litigant to amend – just once – his pleading. Such an amendment of the Federal Rules of Civil Procedure deserves review here – particularly when the District Court invoked an *ad hominem* rationale to deny any amendment.

Wherefore, the Eleventh Circuit's affirming of the District Court's denial of leave to Petitioner to amend his complaint (i) so far departed from the accepted and usual course of judicial proceedings and/or sanctioned such a departure by a lower court as to call for an exercise of this Court's supervisory power and (ii) decided an important

federal question – permission to amend a complaint once as a matter of right – in a way that conflicts with relevant decisions of this Court.

IV. The "Do Not Publish" Decision of the Eleventh Circuit Violates *Stare Decisis*

Invoking Eleventh Circuit Rule 36-2, the Eleventh Circuit's opinion in this matter was ordered as "Do Not Publish". Appendix-35 *infra*.

Rule 36-2 states "An opinion shall be unpublished unless a majority of the panel decides to publish it. Unpublished opinions are not considered binding precedent. They may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition, motion or response in which such a citation is made."

Rule 36-2 and it use in this matter, (i) conflicts with the holding of the United States Court of Appeals for the Eighth Circuit and Fifth Circuit, (ii) departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power and (iii) raises an important question of federal law that has not been, but should be, settled by this Court.

In *Marbury v. Madison*, 5 U.S. 137 (1803) this Court recognized that inherent in every judicial decision was a declaration and interpretation of the relevant general principles of law. "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Id.* at 177.

Fundamental to this decision making process was that

the enunciated law be subsequently applied to subsequently similarly situated litigants. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). "But selective prospectivity also breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally." *Id.* at 544.

Indeed, this principle of reliance upon enunciated precedent is at the backbone of our legal system. As most eloquently stated by Justice Joseph Story, *Commentaries on the Constitution of the United States* §377-78 (1983): "A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles."

Here, the use of "Do Not Publish" is the very "alarming doctrine" of which Justice Story speaks. By designating the opinion below "Do Not Publish", the Eleventh Circuit has permitted itself the ability (i) to ignore its relevant prior "Do Not Publish" opinions in deciding this matter and (ii) ignore this opinion when a similarly situated matter occurs in the future. Plainly, such power violates the "fundamental component of *stare decisis* and the rule of law generally." *James B. Beam Distilling Co.* at 544.

In *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated*, 235 F.3d 1054 (8th Cir. 2000) (en banc), the court in addressing the constitutionality of its Rule 28A(i) – similar in effect to the Eleventh Circuit's Rule 36-2 – held:

> Federal courts, in adopting rules, are not free to extend the judicial power of the United States described in Article III of the Constitution. *Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992). The judicial power of the

> United States is limited by the doctrine of precedent. Rule 28A(i) allows courts to ignore this limit. If we mark an opinion as unpublished, Rule 28A(i) provides that is not precedent. . . . Rule 28A(i) expands the judicial power beyond the limits set by Article III by allowing us complete discretion to determine which judicial decisions will bind us and which will not. Insofar as it limits the precedential effect of our prior decisions, the Rule is therefore unconstitutional.

Id. at 905. Noteworthy is that the vacation *en banc* in *Anastasoff* was based upon the contested issue becoming moot, not upon a retreat from the holding contained in the original panel decision.

More recently, in *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260 (5th Cir. 2001), three judges of the Fifth Circuit dissented from a denial of a petition for rehearing *en banc* based upon grounds that Fifth Circuit Rule 47.5.4 – an analog to Eleventh Circuit Rule 36-2 – was unjustified, raised important questions involving equal protection and warranted full consideration by the Fifth Circuit *en banc*.

Finally, this Court has recognized the fundamental nature of *stare decisis* in maintaining the legitimacy of the judicial branch which has no external power to enforce its authority. In *Planned Parenthood v. Casey* 505 U.S. 833 (1992), Justice O'Connor, Justice Kennedy, and Justice Souter articulated the very essence of *stare decisis* and its necessity to the continued legitimacy of the judicial branch of government:

> The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically

> upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands. . . That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all.

Here, by permitting the Eleventh Circuit to issue its opinion "Do Not Publish", the legitimacy of that court is undermined as it is failing to "to determine what the Nation's law means and to declare what it demands". Instead, the "Do Not Publish" decisions – as here – are determined without reference to prior law and are exempt as binding precedent on future cases. Such a result is "no judicial act at all."

Accordingly, certiorari review under Rule 10(a) is appropriate as Rule 36-2 of the United States Court of Appeal for the Eleventh Circuit (i) conflicts with the holding of the United States Court of Appeals in *Anastasoff* and *Williams*, (ii) departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power and (iii) raises an important question of federal law that has not been, but should be, settled by this Court.

CONCLUSION

Petitioner here – a six year old boy – is denied by the State of Florida through its agent, Respondent, an equal share of the financial support Petitioner's Father has available for his four children. Instead, Florida mandates that the three children of Father's first marriage receive 133% of Father's income – an incarcerates Father when he cannot pay this absurd amount – thereby leaving neither financial nor *in personam* support for Petitioner from his Father. Moreover, the corrosive effect upon Petitioner is not limited to financial deprivations, for Petitioner is growing up wondering why he is being denied "substantial benefits accorded" to Father's first three children. *Gomez* at 537.

Petitioner has no venue in Florida State court to raise this claim. He has been denied recognition in and access to the state courts by Florida State court order. Even if permitted to raise his equal protection claim in Florida State Court, he would have it denied by reason of Florida Statute §61.30(12) and the cases holding that statute constitutional. Therefore, abstention under *Younger* was impermissible given that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule.. . . Abstention rarely should be invoked, because the federal courts have a virtually unflagging obligation . . . to exercise the jurisdiction given them. *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992) (Citations omitted). Here, that plainly placed jurisdiction is found at §1983.

Moreover, for both the District Court and the Eleventh Circuit Court of Appeals to deny to Petitioner leave to amend his complaint (i) so far departed from the accepted and usual course of judicial proceedings and/or sanctioned such a departure by a lower court as to call for an exercise of this Court's supervisory power and (ii) decided an important federal question in a way that conflicts with relevant cited

decisions of this Court.

Last, this Court would not entertain the notion that it could decide cases brought before it and then issue its decisions "Do Not Publish" for reasons so stark under the fundamental doctrine of *stare decisis* that it simply is inapposite to the settle rule of law to consider such a course. Accordingly, the Eleventh Circuit Court of Appeals – a mini-Supreme Court in and of itself given this Court's annual acceptance of only 80-90 cases among the 8,000 filed each year – can no less discharge its obligation under *stare decisis* and continue to issue opinions "Do Not Publish".

WHEREFORE, Petitioner requests that this Petition for Certiorari be granted to review the issues raised herein.

Respectfully submitted,

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Counsel for Petitioner